APPEAL NO. 92417

A contested case hearing was held on June 15, 1992, in (city), Texas, with (hearing officer) presiding. The sole issue was whether the impairment rating assessed by the designated doctor should be used. The hearing officer held that the great weight of the medical evidence was not contrary to the designated doctor's report, which assigned a 4.2% whole body impairment rating. Appellant (claimant below) contends the hearing officer erred in finding that the great weight of the other medical evidence was not contrary to the designated doctor's report. Appellant's request for review attached documents which he claimed supported his position. (An original request for review was timely filed by counsel for appellant. Appellant retained new counsel a few days later. Because both documents were filed within the prescribed time period, and because the second appears to adopt the arguments of the first by reference, we will consider both documents.) Respondent (workers' compensation insurance carrier below) contends the hearing officer's decision is fully supported by credible evidence of record and urges this panel not to consider any evidence not offered at the hearing.

DECISION

We affirm the hearing officer's decision in this case.

Appellant testified that on (date of injury) he was working for (employer) using a machine that fills glass jars. When he was turning the transmission of the machine the nail holding the clutch broke which made him jerk up, hurting his back and hitting his arm. He said the incident aggravated a preexisting neck and shoulder injury.

Admitted into evidence as appellant's exhibits were reports signed by appellant's treating doctor, (Dr. EH). An initial medical report, dated November 12, 1991, diagnosed lateral epicondylitis of the right elbow, prescribed anti-inflammatory medication, and said appellant was unable to return to his regular occupation which requires repetitive use of his arm. A medical evaluation report (TWCC-69) signed by Dr. EH and dated March 17, 1992, certified maximum medical improvement (MMI) as of March 9, 1992, and gave a whole body impairment rating of 24%.

Respondent introduced into evidence a September 16, 1991 independent medical evaluation from (Dr. A). Dr. A found some limitation of overhead reach at the shoulder with a subacromial impingement syndrome and positive Jobe maneuver. He also said "there is no objective evidence to suggest the patient will retain a partial permanent impairment of the right upper extremity injury."

Appellant said he went to see (Dr. GH) upon direction of the Commission following a benefit review conference. A TWCC-69 with an attached narrative of Dr. GH dated April 30, 1992 stated appellant was referred for an independent medical evaluation. However, the benefit review officer's report stated that Dr. GH was a designated doctor appointed under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §130.6 (Rule 130.6). Dr. GH found mild

synovial hypertrophy and certified MMI as of February 1992, with a whole body impairment rating of 4.2%.

In addition to the above, appellant testified that he went to a (Dr. V) for an EMG. He said Dr. V was going to write a letter telling Dr. EH that appellant needed surgery to remove scar tissue under his arm; however, appellant said he was fearful of such an operation because he was told there would only be a 50-50 chance of improvement. He said he had not seen the letter from Dr. V. Appellant also said he would go back to work if employer's supervisors would not ignore doctor's limitations and the limitations on appellant imposed by employer's safety director. He said the pain in his arm is sufficiently sharp that he cannot hold a wrench to tighten a nut.

In its request for review appellant claims the hearing officer placed no weight on January 7, 1992 results of EMG and NCV studies by a (Dr. R) which, contrary to Dr. A's and Dr. GH's reports, revealed appellant was suffering with bilateral carpal tunnel syndrome and ulnar nerve entrapment of the right elbow. Appellant argues that Dr. V, in a February 18, 1992 report (attached to appellant's pleading), recommended decompressive surgery of the right ulnar and median nerves which the carrier refused to approve. Appellant contended the hearing officer failed to give any weight to the report of the treating doctor, who is more familiar with the condition and treatment of appellant. His request for review also refers to an attached letter from Dr. EH which states his dissatisfaction with the findings of the designated doctor. Appellant also appears to complain that a November 5, 1991 letter from Dr. A contradicts his September 16, 1991 findings. Appellant asks that we consider the new material presented with his appeal and to reverse the decision of the hearing officer. In the alternative, he asks that we appoint a different designated doctor to determine impairment.

The Texas Workers' Compensation Act , TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1992) (1989 Act) provides that when a dispute exists over an employee's impairment rating, the Commission shall direct the employee to be examined by a designated doctor. If the parties cannot agree on the doctor, the Commission shall select the doctor. The report of the designated doctor shall have presumptive weight, and the Commission shall base its determination on that report, unless the great weight of the other medical evidence is to the contrary. Article 8308-4.26(g).

In the instant case, the hearing officer adopted the designated doctor's impairment rating. (The hearing officer found the appellant to have reached MMI on March 9, 1991, per the stipulation of the parties.) The Act provides that the hearing officer is, among other things, the sole judge of the weight and credibility to be given to the evidence. Article 8308-6.34(e). We will not reverse the decision of the hearing officer unless it is so weak or against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Pool v. Ford Motor Company, 715 S.W.2d 629 (Tex. 1986). In this case the hearing officer based her decision upon the evidence that had been introduced at the hearing; appellant did not offer the February 18th report of Dr. V (which referred to studies

by Dr. R). Our review of the evidence in the case thus does not convince us that the decision and order should be reversed.

Appellant argues that more weight should be given to the opinion of the treating doctor, and says that the treating doctor was not provided with the designated doctor's report nor given a chance to comment until after the hearing. This misconstrues the purpose behind the appointment of a designated doctor, which is designed to reach final resolution of disputes over MMI or impairment. Unlike a doctor selected by the carrier under Article 8308-4.16, a designated doctor is required by rule only to file his report with the Commission, the employee, and the insurance carrier. *See* Rule 130.1(h); *cf* Rule 130.3(a). Further, the designated doctor's report raises a presumption in favor of that doctor's opinion which may be rebutted by the great weight of the other medical evidence. To overcome the presumption, appellant bore the responsibility of introducing sufficient medical evidence to the contrary.

The 1989 Act requires this panel to limit its consideration of evidentiary matters in the record developed at the contested case hearing. Article 8308-6.42(a)(1). There is nothing to indicate that the data appellant offers on appeal constituted evidence which was unknown or unavailable at the time of the hearing or that due diligence would not have brought them to light. *See* Texas Workers' Compensation Commission Appeal No. 91132 (Docket No. redacted), decided February 14, 1992. For the reasons stated earlier, we are not persuaded by the fact that the treating doctor was not able to respond to the designated doctor's report prior to the hearing.

The decision and order of the hearing officer are affirmed.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Philip F. O'Neill
Appeals Judge